

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Saxon Global, Inc.; Lucid Technologies,)	C/A No.: 3:19-cv-2194
Inc.; Vastek, Inc.; Lean Innovation Labs,)	
LLC; Redbud Technologies, Inc.; Techstra)	
Solutions LLC; Techno Bytes, Inc.;)	
Pyramid Consulting, Inc.; Genius Minds,)	
LLC; Denken Solutions, Inc.; and Binary)	
Computer Intl Corp.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
Kenneth T. Cuccinelli II, Acting Director,)	
United States Citizenship and Immigration)	
Services,)	
)	
Defendant.)	
)	

SECOND AMENDED COMPLAINT

Based on the consent of the Defendant and Rule 15, Plaintiffs now file their second amended complaint. Lead Plaintiff Saxon Global Inc. (“Saxon”) is an information technology consulting company based in Irving, Texas. Saxon hires qualified information technology (“IT”) professionals as employees, and then places them at third-party sites that need their services. Saxon employs hundreds of individuals, a majority of which are on non-immigrant visas under 8 U.S.C. § 1101(a)(15)(H)(i)(B) (“H1B Visa”). On February 20, 2018, Defendant (“USCIS”) issued a binding policy memo to its adjudicators, setting new substantive rules that apply only to IT consulting companies, but it did not go through notice and comment rulemaking. Before the memo, during the years of 2011 – 2017, Saxon had an overall approval rate on its H1B visas of 93%; USCIS approved 285 of 308 visa petitions Saxon filed. Since the memo, Saxon had an overall approval rate of 57%; USCIS approved only 54 of 94 petitions Saxon filed. Saxon’s business model did not change; USCIS’s rules did. Saxon’s experience is

illustrative of the experiences shared by hundreds of information technology consulting companies. Now, Saxon and its co-plaintiffs—similarly situated information technology consulting companies—challenge twenty-one separate H1B Visa denials based on USCIS’s new, unlawful rules promulgated in its 2018 memo.

PARTIES

1. Plaintiff Saxon Global, Inc. (“Saxon”) is incorporated under the laws of Texas with its principle place of business in Irving, Dallas County, Texas.
2. Plaintiff Lucid Technologies, Inc. (“Lucid”) is incorporated under the laws of Texas with its principle place of business in Irving, Dallas County, Texas.
3. Plaintiff Redbud Technologies, Inc. (“Redbud”) is incorporated under the laws of Texas with its principle place of business in McKinney, Texas.
4. Plaintiff Vastek, Inc. (“Vastek”) is incorporated under the laws of California with its principle place of business in San Diego, California.
5. Plaintiff Lean Innovation Labs, LLC (“Lean”) is organized under the laws of Virginia with its principle place of business in Reston, Virginia.
6. Plaintiff Techstra Solutions LLC (“Techstra”) is organized under the laws of Pennsylvania with its principle place of business in Pittsburgh, Pennsylvania.
7. Plaintiff Techno Bytes, Inc. (“Techno Bytes”) is incorporated under the laws of Maine with its principle place of business in Ashland, Maine.
8. Plaintiff Pyramid Consulting, Inc. (“Pyramid”) is incorporated under the laws of Georgia with its principle place of business in Alpharetta, Georgia.
9. Plaintiff Genius Minds, LLC (“Genius Minds”) is organized under the laws of

Nevada with its principle place of business in Las Vegas, Nevada.

10. Plaintiff Denken Solutions, Inc. (“Denken”) is incorporated under the laws of California with its principle place of business in Irvine, California.

11. Plaintiff Binary Computer Intl Corp. (“Binary Computer”) is incorporated under the laws of New Jersey with its principle place of business in Edison, New Jersey.

12. Defendant Kenneth T. Cuccinelli II is the Acting Director of United States Citizenship and Immigration Services (“USCIS”). He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H).

VENUE AND JURISDICTION

13. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

14. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, et seq.) (“APA”).

15. Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

16. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

17. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because Saxon, Lucid, and Redbud do business in Dallas County, Texas. If venue is proper for even a lone plaintiff in this Court, it is proper for all of the plaintiffs.

18. No statute or regulation requires an administrative appeal in this case. Thus, Plaintiffs have exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

19. USCIS’s denials of Plaintiffs’ Form I129, Petitions for Nonimmigrant Workers are final

agency actions. 5 U.S.C. § 704.

LEGAL FRAMEWORK

H1B Visa Program

20. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill “specialty occupations.” *See* 8 U.S.C. § 1184(g).

21. Specialty occupations are those that require, at a minimum, a bachelor’s degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

22. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) (“H1B Visa”).

23. The relevant regulation identifies the following as exemplar backgrounds for specialty occupations: “architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.” 8 C.F.R. § 214.2(h)(2)(ii).

24. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor (“DOL”). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

25. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers’ pay and conditions.

26. The employer then signs the approved Labor Condition Application. By signing the LCA (“LCA”), the employer agrees to submit to DOL’s enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the LCA is subject to DOL’s jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

27. After receiving an approved LCA and signing it, employers then file an I-129, Petition

for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services (“USCIS”).

28. The demand for Cap H1Bs is significant. *See* Proposed Rule, Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406, 62424 Table 7 (Dec. 3, 2018).

29. Because congress only allocated 85,000 H1B visas a year, with certain exceptions not relevant here, USCIS conducts a lottery each April to “select” 85000 petitions. *Id.* at 62411-12. This statutory pool of 85,000 H1B visas are referred to as “Cap H1B Visas.”

30. Of these 85,000 visas, 65,000 Cap H1B Visas are available to foreign nationals with a college degree. *See* 8 U.S.C. § 1184(g)(1)(A)(vii). And the remaining 20,000 Cap H1B Visas are only available to foreign nationals with master’s degrees or higher from a United States, non-profit institute of higher education.

31. If an employer’s petition is selected in the lottery, USCIS cashes the petitioner’s filing fee checks, receipts the petition, and considers its merits. If approved, a beneficiary can live and work in the United States on their Cap H1B Visa, generally, for up to 6 years. *See* 8 C.F.R. § 214.2(h)(15(ii)(B) (“The alien’s total period of stay may not exceed six years.”); 8 U.S.C. § 1184(g)(4).

32. If an employer’s petition is not chosen in the Cap H1B visa lottery, the petition is returned and USCIS does not consider the merits of the petition. And the employer may not apply again for a Cap H1B until the following fiscal year’s lottery, and there are no guarantees the employer will be selected in the next lottery.

33. If an employer’s petition is chosen in the lottery, USCIS’s then reviews the eligibility for the proposed specialty occupation’s job duties and determines whether they require “theoretical and practical application of a body of highly specialized knowledge” that is on a level associated

with the attainment of a bachelor's degree or equivalent experience. See 8 U.S.C. § 1184(i).

H1B Eligibility Criteria

34. USCIS is charged with determining only whether a proffered position is a “specialty occupation.”

35. Congress defined “specialty occupation” as a position that requires a certain level of education or experience:

(1) . . . the term “specialty occupation” means an occupation that requires—

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

36. USCIS has further interpreted these requirements in its regulations:

To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position;
or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

37. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

38. In addition to this statute and regulation, in the last three years, USCIS has created various substantive rules through sub-regulatory guidance with dubious legal authority.

Specific Work Assignment Rule

39. Consistent with the Buy American Hire American Executive Order, recently, USCIS has started seeking evidence that the petitioning employer provides evidence that petitioner has specific, Specific Work Assignments in a specialty occupation for the beneficiary for the entirety of the length of the visa.

40. While the parameters of USCIS's "Specific Work Assignment Rule" are unclear, it is clear that, if the employer cannot show consistent work for an employee for the next three years, regardless of the nature and details of such work, it cannot satisfy USCIS's Specific Work Assignment Rule.

41. But the statutory scheme rejects a requirement that the employer provide proof of specific or Specific Work Assignments for the *entirety of the duration* of the visa validity period. 8

U.S.C. § 1182(n)(2)(C)(vii).

42. In fact, § 1182(n)(2)(C)(vii) expressly allows employers to hire a foreign national with an H1B Visa and place them in a “non-productive status” (which is defined as not having enough work to perform) provided the employer continues to pay the wages required on the LCA. *Id.*

43. Importantly, congress authorized DOL, not USCIS, to oversee these worker-protection provisions through enforcement actions to compel compliance or remedy violations of the employer’s attestations on the Labor Condition Application.

44. As mentioned above, an employer submits a Labor Condition Application, DOL approves it, and the employer signs it. At that moment, the employer has agreed to employ the beneficiary for the duration of the period approved—three years for most H1B Visa applications—in compliance with the terms of the Labor Condition Application. The terms of the Labor Condition Application include paying a prevailing wage during any periods of non-productive status.

45. Congress and DOL, therefore, ensure an employer will employ an employee in a specialty occupation for three years by requiring the employer to pay the worker the wage associated with the specialty occupation for the entirety of the three-year period. Congress did not require an employer to identify specific, non-speculative work duties for three years.

46. USCIS’s Specific Work Assignment Rule defies this paradigm.

47. First, nothing in 8 U.S.C. § 1184(i) indicates that Congress intended to delegate this authority to USCIS. USCIS seemingly recognizes this by trying to shoehorn its Specific Work Assignment Rule into its analysis of whether a particular position is a specialty occupation.

48. Second, USCIS tacitly recognized that a Specific Work Assignment Rule is a legislative rule, requiring notice and comment rulemaking, because it issued a notice of proposed

rulemaking to enact a similar rule in 1998. *See* Proposed Rule, *Petitioning Requirements for H Nonimmigrant Classification*, 63 Fed. Reg. 30419 (June 4, 1998).

49. In the Proposed Rule USCIS proposed prohibiting hiring “temporary foreign workers to meet possible workforce needs arising from *potential business expansions or the expectation of potential new customers or contracts*.” *Id.* But even under such proposed rule, USCIS would only consider whether there was work available when the petition was initially filed. *Id.* Thus, even though the proposed rule sought to preclude speculative work, it did not go nearly as far as requiring specific and Specific Work Assignments for the entire three-year duration of the visa validity period. *See id.*

50. However, on October 21, 1998, before USCIS could conclude notice and comment on this proposed rule, congress passed and the President signed the American Competitiveness and Workforce Improvement Act of 1998 (“ACWIA”), Title IV, Pub.L. 105-277 (October 21, 1998). ACWIA contained the “non-productive status” provision, allowing gaps in employment for H1B Visa holders but requiring H1B Visa employer to pay those workers during any such non-productive status. *See* 8 U.S.C. § 1182(n)(2)(C)(vii).

51. It is no surprise USCIS abandoned its rulemaking; Congress explicitly rejected it. Curiously, USCIS’s Administrative Appeals Office continues to cite to this abandoned rulemaking as controlling legal authority to justify its demands that consulting and staffing companies provide evidence of guaranteed specific and Specific Work Assignments for the entire three years of an H-1B Visa.

52. USCIS’s Specific Work Assignment Rule seeks to go further than its 1998 proposed rule and it directly conflicts with § 1182(n)(2)(C)(vii). It is therefore unlawful.

Actual Control Rule

53. Consistent with the Buy American Hire American Executive Order, recently, USCIS has started to deny H1B Visas because the petitioning employer—primarily IT consulting companies—do not have an Actual Control relationship with the foreign national worker.

54. USCIS’s “Actual Control Rule” appears to be based on the following rationale: The employer petitioning for the H1B Visa does not have an Actual Control relationship with the foreign national employee because the employer will place the foreign national employee off-site at a third-party company and that third-party company, not the petitioning employer, will have actual control over the employee. Without actual control over the employee’s every action, the petitioning employer cannot show an Actual Control relationship and, therefore, is not entitled to an H1B Visa.

55. This rule, however, fails to recognize that the DOL is the only agency authorized to make such a finding and it has expressly rejected this rationale because the statutes clearly delineate DOL and USCIS’s separate roles in the H1B Visa process. In fact, DOL—not USCIS—has engaged in multiple rounds of notice and comment rulemaking and considered the question of whether consulting, staffing, or job contractors are proper “employers” under the H-1B program. 56 Fed. Reg. 54720-54739, October 22, 1991; 57 Fed. Reg. 1316-1338, January 13, 1992; 59 FR 65646, December 20, 1994.

56. Each time, DOL has determined that IT consulting companies are employers even if they place all its employees at off-site locations for third-party companies. *Id.*

57. DOL’s authority to determine whether a company is an employer for purposes of an H1B Visa is located in 8 U.S.C. §§ 1182(n) & (p).

58. DOL may not issue an approved Labor Condition Application to anyone other than an “employer.” *See* 8 U.S.C. § 1182(n)(1)(A).

59. Neither § 1182(n) nor any other statute gives USCIS authority, joint with DOL or individually, to address this question or to disagree with DOL’s determination.

60. USCIS’s whole reliance on DOL for this determination can even be found in USCIS’s interpretation of the controlling statutes manifested in their regulations.

61. USCIS has a definition of “employer” in its regulation. 8 C.F.R. § 214.2(h)(4)(ii) but it was copied, verbatim, from DOL’s regulation that was designed to explicitly allow consulting, staffing, and job contracting companies. 20 C.F.R. § 655.715 (1991-1997), 56 Fed. Reg. 54720-54739 (Interim Rule).¹

62. In light of the DOL’s exclusive statutory and regulatory authority over the determination of who is an H1B employer and USCIS’s prior recognition of such exclusive authority, USCIS’s current Actual Control Rule is unlawful.

FACTS

63. Plaintiffs are all IT consulting companies.

64. To this end, they place their employees at third party company sites to perform complex, IT services.

65. Plaintiffs have the right to control all of their employees. Each has the right to hire, fire, and pay all of its employees.

¹ It cannot be disputed that the rulemaking where USCIS adopted DOL’s definition of employer was for the limited purpose of explaining that H1B employer petitioners must have a physical location in the United States. 56 Fed. Reg. 61111-61121, December 2, 1991 (“In order to provide clarification, the Service has included a definition of the term “United States employer” in the final rule”).

66. Like all of the plaintiffs, Lead Plaintiff Saxon has used H1B visas for years. The chart below demonstrates how many Initial Applications, Initial Denials, Continuing Approvals, and Continuing Denials Saxon has filed and received from USCIS from 2011 to present:

Fiscal Year	Employer	Initial Approvals	Initial Denials	Continuing Approvals	Continuing Denials
2011	SAXON GLOBAL INC	18	1	18	0
2012	SAXON GLOBAL INC	16	1	15	1
2013	SAXON GLOBAL INC	14	5	11	1
2014	SAXON GLOBAL INC	9	0	34	3
2015	SAXON GLOBAL INC	13	1	32	1
2016	SAXON GLOBAL INC	11	0	46	2
2017	SAXON GLOBAL INC	3	1	45	6
2018	SAXON GLOBAL INC	0	0	0	1
2018	SAXON GLOBAL INC	2	2	36	23
2019	SAXON GLOBAL INC	2	6	14	8

“Initial” approvals and denials relate to a first-time H1B Visa application. A “continuing” approval or denial relates to an H1B Visa application on behalf of a beneficiary who already received an initial H1B visa. These are either extensions for existing employees or transfer applications for new employees who received their H1B Visas through a different employer.

67. From 2011 to 2017, Saxon’s overall approval rate was 93%. Its approval rate for initial applications was 90% and its approval rate for continuing applications was 93%.

68. From 2018 to present, Saxon’s overall approval rate was 57%. Its approval rate for initial applications was 33% and its approval rate for continuing applications was 61%.

69. Saxon did not change its business model.

70. All Plaintiffs have experienced decreases in their approval rates.

Saxon

71. During 2018 and 2019, Saxon applied for H1B visas for Srikanth Varadaraj (WAC1918754252); Manish Aryal (WAC1921050662); Bharath Voddapelly

(WAC1916951553); and Gopi Krishna Deekonda (WAC1917353771)

72. USCIS denied Saxon's initial H1B Visa petitions on behalf of Aryal and Deekonda based on both its Actual Control Rule and its Specific Work Assignment Rule. It denied Saxon's initial H1B Visa petitions on behalf of Vardaraj and Voddapelly based on its Specific Work Assignment Rule alone.

73. After filing this suit, USCIS reopened all of these denials and issued requests for evidence. The requests for evidence seek additional information on the challenged rules. Two of them also seek additional evidence on additional grounds for denial.

74. Upon information and belief, USCIS reopened the cases and issued requests for evidence to gain an advantage in litigation, not to give any response a good faith review.

Vastek

75. During 2019, Vastek applied for H1B Visas for Venu Gopal Vemuri (WAC1917752029); Sai Juturu (WAC1919350165); Ashar Furquan (WAC1919152445); and Srinivas Hemanth Sagili (WAC1919350306).

76. USCIS denied all of Vastek's application based on its Specific Work Assignment Rule and it denied its Application on behalf of Mr. Vemuri based on both the Specific Work Assignment Rule and the Actual Control Rule.

Lean

77. During 2019, Lean applied for an H1B Visa on behalf of Rohith Nama (EAC1916053179).

78. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Redbud

79. During 2019, Redbud applied for an H1B Visa on behalf of Sri Vaishnavi Akula

(WAC1917250336).

80. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Lucid

81. During 2019, Lucid applied for an H1B Visa on behalf of Praveen Anthati (WAC1916952014).

82. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Techstra

83. During 2019, Techstra applied for an H1B Visa on behalf of Aranta ChatterJee (EAC1916852204).

84. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Techno Bytes

85. During 2019, Techno Bytes applied for an H1B visa on behalf of Deepak Raj Joshi (EAC1915652373).

86. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Pyramid

87. During 2019, Pyramid applied for an H1B Visa on behalf of Tajreen Praveen Khan (WAC1919251535).

88. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

Genius Minds

89. During 2019, Genius Minds filed H1B Petitions on behalf of Pooja Thapliyal (WAC1918552637), Sumanaswini Chamarthi (WAC1918552230), and Shilpa Asranna (WAC1918651844).

90. USCIS denied all the applications for Thapliyal and Chamarthi based on its Specific Work Assignment Rule and it denied the application for Asranna based on both the Specific Work Assignment Rule and the Actual Control Rule.

Denken

91. During 2019, Denken filed H1B petitions on behalf of Rahul Khiyani (WAC1916951214), Vijay B R Chanwala (WAC1917253347), and Anvesh Kumar Chennamadhava (WAC1917252741).

92. USCIS denied all the applications for Khiyani and Chanwala based on its Specific Work Assignment Rule and it denied the application for Chennamadhava based on both the Specific Work Assignment Rule and the Actual Control Rule.

Binary Computer

93. During 2019, Binary Computer filed an H1B Petition on behalf of Monica Kambham (EAC1915651216).

94. USCIS denied it based on both the Specific Work Assignment Rule and the Actual Control Rule.

95. Both of the rules underlying all of these denials are unlawful.

96. Based on these denials, Plaintiffs will lose Cap H1B visa petitions numbers. Because there are a limited number of new H1B visas available each year, USCIS re-allocates the H1B Visa number to a different petitioner if the H1B Visa petition is selected in the H1B Visa lottery

but later denied.

97. Based on these denials, Plaintiffs will lose the H1B Visa numbers associated with these twenty-one H1B Visa petitions, and there is no guarantee that USCIS will pick these petitions in a subsequent lottery. This harm is irreparable.

98. Plaintiffs will also suffer financial harm from applying for an H1B Visa when that petition is selected in the lotter but later denied. Plaintiffs pay approximately \$6800 in filing fees for each application. Plaintiffs also pay attorneys' fees for each application. Plaintiffs will lose this money based on the challenged denials and it is unable to sue USCIS for money damages. This financial harm is irreparable.

99. Finally, the beneficiaries of these visa petitions risk losing their immigration status and their work authorization due to these denials. Courts have recognized harm to immigration status as irreparable harm.

FIRST CAUSE OF ACTION
(APA - the Denial is Arbitrary and Capricious)

100. Plaintiffs re-allege all facts herein.

101. USCIS's denials are final agency actions that aggrieved Plaintiffs. 5 U.S.C. § 704.

102. USCIS's denials are based on its Specific Work Assignment Rule and Actual Control Rule

103. USCIS's denial violates the APA because its bases—Specific Work Assignment Rule and the Actual Control Rule—are *ultra vires* and, therefore, the denials are in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 706(2)(C).

104. USCIS's denial violates the APA because its basis—Specific Work Assignment Rule and the Actual Control Rule—constitute legislative or substantive rules that did not go through notice and comment rulemaking and, therefore, the denials are without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

105. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—is arbitrary and capricious as it contradicts § 1182(n)(2)(C)(vii) and DOL's approval of the Labor Condition Application finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

106. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—violates the Plaintiffs' freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

107. USCIS's denial violates the APA because its basis—the Actual Control Rule—constitutes a legislative rule that did not go through notice and comment rulemaking and, therefore, the denial is without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

108. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—is arbitrary and capricious as Plaintiffs provided sufficient evidence in its H1B Visa application to prove specific, non-speculative work and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

109. USCIS's denial violates the APA because its basis—the Actual Control Rule—is arbitrary and capricious as it contradicts DOL's employer finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

110. USCIS's denial violates the APA because its basis—the Actual Control Rule—is arbitrary and capricious as the Plaintiff provided sufficient evidence in its H1B Visa application to prove an Actual Control relationship and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

111. USCIS's denial violates the APA because its basis—the Actual Control Rule—violates the Plaintiff's freedom to contract under the United States constitution and, therefore, is contrary

to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

112. Similarly, to the extent these rules are lawful, as applied, the denial is arbitrary and capricious. A final agency action is arbitrary and capricious where:

USCIS has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before USCIS, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

113. These twenty-one denials are arbitrary and capricious because the denials run counter to the evidence in the record as Plaintiffs provided sufficient evidence to satisfy USCIS's Specific Work Assignment Rule and its Actual Control Rule.

114. Finally, until Plaintiffs acquire the certified administrative record, they will be unable to identify all claims of error; Plaintiffs expressly reserve the right to make additional claims of error under the APA after production of the certified administrative record.

115. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, declare Plaintiffs' proffered positions as specialty occupations, instruct it to re-adjudicate the H1B Visa applications without applying the Specific Work Assignment Rule or the Actual Control Rule

PRAYER FOR RELIEF

Plaintiffs, therefore, pray that this Court enter the following relief:

1. Take jurisdiction over this case;
2. Declare USCIS's Specific Work Assignment Rule and its Actual Control Rule as substantive or legislative rules that did not go through notice and comment rulemaking and, therefore, invalid;
3. Declare USCIS's Specific Work Assignment Rule unlawful or arbitrary and capricious;
4. Declare USCIS's Actual Control Rule unlawful or arbitrary and capricious;

5. Declare USCIS's denials violative of the Administrative Procedure Act;
6. Remand this case to USCIS with instructions to re-adjudicate these cases in compliance with the above declarations within 15 calendar days;
7. Grant all relief that is necessary and proper; and
8. Award attorneys' fees and costs under the Equal Access to Justice Act or any other provision of law.

October 21, 2019

Respectfully Submitted,

s/Bradley B. Banias
BRADLEY B. BANIAS
Wasden Banias
1037 Chuck Dawley Boulevard, Suite D100
Mount Pleasant, South Carolina 29464
SC Bar No.: 76653

Appearing Pro Hac Vice

Sharadha Sankararaman
Kodem Law Firm PLLC
Decker Drive Suite 123
Irving, TX 75062
Tel: 1-888-955-6634
Fax: 817-778-9980
sharadha.kodem@kodemlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing and all attachments on the court's electronic filing system which forwarded accurate copies to counsel for all parties.

October 21, 2019

Respectfully Submitted,

s/Bradley B. Baniyas

BRADLEY B. BANIAS

Wasden Baniyas

1037 Chuck Dawley Boulevard, Suite D100

Mount Pleasant, South Carolina 29464

SC Bar No.: 76653

Appearing Pro Hac Vice